

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

3 MIDAS GREEN TECHNOLOGIES,) Docket No. WA 22-CA-050 ADA
4 LLC)
5 vs.) Waco, Texas
6 RHODIUM ENTERPRISES,)
7 INC, ET AL) October 6, 2023

8 TRANSCRIPT OF DISCOVERY HEARING VIA VIDEOCONFERENCE
9 BEFORE THE HONORABLE ALAN D. ALBRIGHT

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25 Proceedings reported by digital sound recording,
transcript produced by computer-aided transcription.

10:32:27 1 THE COURT: Good morning, everyone.

10:32:28 2 Jen, would you call the case, please.

10:32:30 3 THE CLERK: Civil action in Case 6:22-CV-50,
10:32:34 4 Midas Green Technologies, LLC vs. Rhodium Enterprises,
10:32:38 5 Incorporated. Case called for a discovery hearing.

10:32:41 6 THE COURT: Announcements from counsel, please.

10:32:44 7 MR. SMITH: Your Honor, for Plaintiff Midas
10:32:46 8 Green, Michael Smith, Joe Thomas and Henry Pogorzelski.
10:32:48 9 Mr. Thomas will be speaking for us and we're ready to
10:32:52 10 proceed.

10:32:54 11 MS. MOORE: And Ashley Moore with Aaron Plesset
10:32:57 12 from Michelman Robinson on behalf of third-party GRC.

10:33:03 13 MR. UNDERWOOD: Good morning, your Honor.

10:33:04 14 This is Travis Underwood, Elizabeth Brannen and
10:33:07 15 Peter Brody on behalf of the defendants and we're ready.

10:33:10 16 THE COURT: Okay. Give me just one second here.
10:33:23 17 Okay. I'll hear from the plaintiff, please.

10:33:27 18 MR. THOMAS: Your Honor, we've summarized our
10:33:29 19 positions, I think, accurately in the submission. What's
10:33:35 20 important to us is getting specific detail on the GRC Gen
10:33:41 21 1 products. They're alleged to be prior art invalidating
10:33:45 22 our patent and they're also alleged to be an acceptable
10:33:48 23 non-infringing substitute by Rhodium. Same issues for Gen
10:33:54 24 2; they're alleged to be an acceptable non-infringing
10:33:57 25 substitute. And we have the patent application that was

10:34:00 1 filed by GRC and under the Gen 2 product, which was
10:34:08 2 published on May 12th, 2022, and specifically at pages 6
10:34:15 3 and 7 are drawings that show strong evidence of copying of
10:34:22 4 key features of our patented claims, including the clear
10:34:27 5 -- the weir, the plenum, the reservoir, the cable
10:34:32 6 management system, among other things.

10:34:34 7 So we have strong evidence of copying or any in
10:34:37 8 existence by virtue of a patent application GRC filed with
10:34:41 9 respect to this Gen 2 product and as noted before, it is
10:34:45 10 alleged --

10:34:45 11 THE COURT: Tell me what you want.

10:34:49 12 MR. THOMAS: We'd like just an order to compel
10:34:51 13 production of the Gen 1 drawings, designs and
10:34:54 14 specifications.

10:34:56 15 THE COURT: Have they not done that?

10:34:58 16 MR. THOMAS: No.

10:35:00 17 THE COURT: Have they said there aren't any?
10:35:01 18 They've looked for them? I mean, y'all are here on a --
10:35:06 19 you've asked for something that is relevant and they've
10:35:09 20 just told you they're not giving them to you.

10:35:12 21 MR. THOMAS: Yes.

10:35:13 22 THE COURT: Okay. Well, let's hear from them.

10:35:15 23 MS. MOORE: Yes, your Honor. Ashley Moore on
10:35:17 24 behalf of GRC.

10:35:18 25 I'll start with the Gen 1 documents, which is RFP

10:35:22 1 No. 1 in dispute here. Setting aside the fact that we
10:35:26 2 very strongly disagree with copying or anything of that
10:35:29 3 nature, the plaintiffs do have the documents. Rhodium
10:35:35 4 requested them over a year ago. We produced documents to
10:35:39 5 Rhodium in compliance with that subpoena and Rhodium has
10:35:43 6 provided those documents to Midas, the plaintiff in this
10:35:47 7 action. In addition --

10:35:48 8 THE COURT: Have you provided all the documents
10:35:50 9 you think are in your custody or control?

10:35:56 10 MS. MOORE: We've complied with what we believe
10:35:57 11 to be relevant that is not already publicly available. We
10:36:00 12 do not think a third party, GRC, should --

10:36:02 13 THE COURT: I got it. So let me hear from
10:36:04 14 plaintiff's counsel. Counsel for defendant says they've
10:36:08 15 produced them.

10:36:10 16 MR. THOMAS: No, they have not produced them.
10:36:11 17 They've produced --

10:36:13 18 THE COURT: Why do you say that?

10:36:14 19 MR. THOMAS: Well, because they have not produced
10:36:16 20 any schematics, drawings or diagrams.

10:36:20 21 THE COURT: But you're -- what you're saying is
10:36:22 22 that there has to be stuff and they haven't produced it.

10:36:27 23 MR. THOMAS: Yes.

10:36:28 24 THE COURT: And she's saying we've produced
10:36:30 25 everything we're supposed to. What exactly would you like

10:36:33 1 me to do? She says I've complied -- as an officer of the
10:36:40 2 Court, they sent me a request, I've complied with it.
10:36:45 3 I've given them everything that we have that isn't
10:36:47 4 available publicly.

10:36:49 5 What do you want me to tell them to do when they
10:36:52 6 say they've given you everything they've been asked for?

10:36:55 7 MR. THOMAS: Well, we know they have drawings,
10:36:58 8 diagrams --

10:36:58 9 THE COURT: No, no, no. No. I've heard -- this
10:37:01 10 is -- I hate this. I get a lawyer comes in, says they
10:37:05 11 have to have stuff they're not giving us. An officer of
10:37:10 12 the Court has just said she's given you everything that
10:37:12 13 they have that's relevant. What do you want me to do?
10:37:16 14 Are you calling her a liar?

10:37:20 15 MR. THOMAS: Your Honor, I --

10:37:21 16 THE COURT: That's the only choice. Either she's
10:37:25 17 lying when she represents that to me or she's given you --
10:37:32 18 you know, now, is there a difference in Gen 1 and Gen 2
10:37:37 19 that I'm not picking up?

10:37:38 20 MR. THOMAS: Yes, there is. There's two
10:37:40 21 separates RFPs: One for Gen 1 one for Gen 2. We are
10:37:43 22 specifically talking about Gen 1 right now. We haven't
10:37:46 23 addressed Gen 2 yet.

10:37:48 24 THE COURT: Okay. On Gen 1, she said she's given
10:37:51 25 you everything you're entitled to.

10:37:53 1 MR. THOMAS: Let me rephrase that, your Honor.
10:37:56 2 What she's saying she did -- Rhodium served a subpoena a
10:38:01 3 while ago on GRC and she's saying she produced some what
10:38:06 4 she believes are relevant documents that were responsive.
10:38:13 5 They're 237 pages. We issued a new subpoena because we
10:38:15 6 did not believe the production addressed the specific
10:38:18 7 documents that we required in order to defend ourselves
10:38:23 8 against the allegation of invalidity and obviousness as
10:38:29 9 well as non-infringing substitute. So we asked for --
10:38:32 10 we're asking for a different subpoena than the one that
10:38:34 11 she said she complied with.

10:38:36 12 THE COURT: Okay. Well, let me hear her on --
10:38:38 13 let me hear defense counsel on that.

10:38:40 14 MS. MOORE: Yes, your Honor.

10:38:41 15 I think they are one in the same both the
10:38:44 16 requests from Rhodium, which was to support, to my
10:38:47 17 knowledge, their invalidity defense. Having not seen
10:38:49 18 their invalidity contentions, I don't know that to be true
10:38:52 19 for a certainty, but I do believe that is what the purpose
10:38:55 20 of the request was and, therefore, that same information
10:38:58 21 is relevant here.

10:39:01 22 It seems to me that essentially what plaintiff is
10:39:04 23 asking for is something that they have access to already.
10:39:08 24 It's available on the internet. That's the whole point of
10:39:11 25 invalidity is, it has to be based on publicly available

1 information that is out for public consumption. They can
2 simply go to GRC's website, get additional materials if
3 they feel like it's insufficient. And to my knowledge,
4 I'm not sure what it is that is insufficient other than
5 thinking there must be other stuff out there, which I'm
6 not aware of what that is.

7 And Midas purchased the very system they're
8 talking about from GRC back in 2009, 2010. So if they
9 want to see how it operates, they have access to the
10 system itself, as well.

11 MR. THOMAS: Well, the system was modified. They
12 continued to sell it and make improvements and
13 modifications well after they sold us their products. And
14 this issue for discovery's not just about invalidity, it's
15 also about a non-infringing substitute. We need to get
16 the specific drawings to ascertain whether or not these
17 are non-infringing substitutes as alleged by Rhodium. So
18 there are two aspects to this discovery dispute and
19 arguing that we have access to stuff on the website does
20 not answer this question at all.

21 THE COURT: She has said she's given you
22 everything they have.

23 MR. THOMAS: No. She gave Rhodium what she had.
24 She hasn't given us -- she gave us objections.

25 THE COURT: One more time from defense counsel.

10:40:34 1 With respect to Gen 1, have you provided everything that
10:40:39 2 is called for in the discovery requests or subpoena, any
10:40:44 3 subpoena that is not privileged or work product that is
10:40:47 4 not accessible in the public?

10:40:50 5 MS. MOORE: And, your Honor, you were asking
10:40:59 6 defense counsel. Not third-party GRC counsel, correct?

10:41:02 7 THE COURT: No. I was talking to you. I'm
10:41:04 8 sorry.

10:41:04 9 MS. MOORE: Oh, I'm sorry. Yes. So we produced
10:41:05 10 that information to Rhodium and then, my understanding is
10:41:07 11 that by virtue of the discovery process, Rhodium has
10:41:11 12 provided that information to plaintiff. I'm not sure
10:41:15 13 what, if anything, has been held back as privileged within
10:41:17 14 those materials, but we gave and turned over what we had
10:41:22 15 to Rhodium.

10:41:22 16 THE COURT: So the plaintiff's fight is with
10:41:25 17 Rhodium if there is one. That was a question for the
10:41:32 18 plaintiff.

10:41:32 19 MR. THOMAS: Oh, I'm sorry, your Honor. Could
10:41:35 20 you state that again?

10:41:36 21 THE COURT: So your fight is not with the third
10:41:38 22 party, it's with Rhodium.

10:41:40 23 MR. THOMAS: Well, I don't see it that way. We
10:41:42 24 issued our own subpoena and she --

10:41:44 25 THE COURT: Well, just -- okay. Counsel for the

10:41:50 1 third party has said they've given everything that's
10:41:52 2 nonpublic to Rhodium. Deal with Rhodium. If Rhodium
10:41:56 3 won't give it to you, I'll get involved then and if -- she
10:42:01 4 said she has complied with your subpoena and that's -- I'm
10:42:04 5 going to leave it there. I'm denying your request for
10:42:06 6 relief.

10:42:07 7 With regard to the second issue, the Gen 2
10:42:12 8 systems, tell me what it is you want there.

10:42:16 9 MR. THOMAS: Well, we want documents, diagrams,
10:42:19 10 reports and drawings sufficient to show the operation of
10:42:23 11 each version of the Gen 2 system because they are alleged
10:42:27 12 to be non-infringing substitutes and we have -- the stuff
10:42:32 13 that's available on their website does not have that
10:42:35 14 detail for us to ascertain that.

10:42:37 15 THE COURT: Now, it's my understanding with
10:42:38 16 regard to this -- the Gen 2 systems, nothing has been
10:42:43 17 produced; is that correct?

10:42:47 18 MS. MOORE: Yes, your Honor. From GRC, nothing
10:42:50 19 has been produced because it's all available on their
10:42:52 20 website. There's hundreds and hundreds of pages of
10:42:58 21 schematics, of pictures of the product. There's a
10:43:01 22 20-minute video showing how the product works, showing it
10:43:05 23 in setup and walking through how it works, pulling the
10:43:09 24 components out of the submersed liquid in the tank.

10:43:13 25 THE COURT: Do you have any internal documents

10:43:14 1 that are more detailed than what's available publicly?

10:43:18 2 MS. MOORE: I would have to go back and check. I
10:43:21 3 don't believe so. The publicly available information is
10:43:24 4 extremely detailed and I'm not aware of any reason why any
10:43:29 5 of that is inadequate to the needs here. As you can see,
10:43:34 6 Midas is very antagonistic towards GRC, who is not a
10:43:38 7 member of this lawsuit and not in this fight, and they are
10:43:42 8 a direct competitor of my client and they are loathe to
10:43:45 9 turn over trade secrets and proprietary information to a
10:43:48 10 direct competitor on this basis, especially when
10:43:52 11 everything that Midas plaintiff should need is available
10:43:55 12 on GRC's website.

10:43:57 13 THE COURT: Well, and here's one other problem I
10:44:00 14 have with your position everything's public is I would
10:44:04 15 think but I don't know. I was never an engineer. But I
10:44:07 16 would think that when you all were designing these
10:44:10 17 products, there had to be design documents that were
10:44:13 18 involved that were not made public that would go to an
10:44:17 19 argument made by the plaintiff, right or wrong, of issues
10:44:22 20 of copying or some other argument they might have.

10:44:25 21 Are there no confidential design documents that
10:44:28 22 are not public that might be relevant to what the
10:44:31 23 plaintiff is asking for?

10:44:32 24 MS. MOORE: I can go back and check, your Honor,
10:44:34 25 to see what, if anything, related to the Gen 2 systems is

1 not available online. But as it relates to the particular
2 patent, it's simply the tank and how it's shaped and what
3 is contained within it. And again, all of that is
4 available on GRC's website. As I said, there's at least
5 one 20-minute video, there's webinars, there's product
6 data sheets, there's specification data sheets, white
7 papers, case studies, webinars.

8 I could go on and on and on. There's hundreds
9 and hundreds of documents on these systems available on
10 GRC's website. And so, I'm not clear what it is that
11 they're looking for that isn't already in the public
12 domain because the way that the product works is
13 specifically shown in, for example, these videos and spec
14 sheets, and it seems completely onerous and unduly
15 burdensome for my client, again, who is a third party, to
16 have to go and search and then, compare and see what's
17 online, what do I need to still go find and then, turn it
18 over to a direct competitor. Because these are the
19 systems in place now that GRC is selling that are at issue
20 with the Gen 2 system.

21 THE COURT: Let me hear from plaintiff's counsel.
22 Is there a time window, a bracket of time window when --
23 tell me the name of the third party again. Tell me the
24 name of your client.

25 MS. MOORE: GRC.

10:46:00 1 THE COURT: Okay. GRC. Would the plaintiff tell
10:46:03 2 me the time window when GRC would have -- they believe
10:46:06 3 might have had design documents that would have been --
10:46:11 4 that you want that are confidential that -- I've heard
10:46:14 5 what is public. Is there a time window you think that
10:46:17 6 would be relevant to what you're doing?

10:46:20 7 MR. THOMAS: Yeah, 2018 to 2020, your Honor.

10:46:23 8 THE COURT: Okay. So if I were to ask counsel
10:46:26 9 for GRC to go back and check whether there are design
10:46:31 10 documents that have been maintained and were kept
10:46:35 11 confidential relating to this tank, I think it is, would
10:46:39 12 that be something counsel for GRC could do?

10:46:43 13 MS. MOORE: Yes, your Honor. We'll go back and
10:46:45 14 take a look.

10:46:45 15 THE COURT: Okay. And then, we have in place in
10:46:48 16 my -- it's either Western District or my court, or both,
10:46:53 17 we have a standing protective order that, you know, you
10:46:55 18 all could enter and protect these things under. So I
10:47:01 19 heard 2018 to 2020. If there are design documents
10:47:05 20 relating to the accused tank of the defendant, then I'd
10:47:10 21 like you to produce those under the protective order
10:47:14 22 attorneys'-eyes-only, okay?

10:47:16 23 MR. THOMAS: Your Honor, could I make one more
10:47:17 24 slight request on this?

10:47:19 25 THE COURT: Sure.

10:47:19 1 MR. THOMAS: That's really the same issue for me
10:47:22 2 on Gen 1. We just want to see, get access to the design
10:47:25 3 drawings. I know they're worried about confidentiality.
10:47:29 4 We have an AEO provision in our protective order, which
10:47:31 5 has already been entered. They can join in on that. I'm
10:47:34 6 happy to mark anything they need to protect it from public
10:47:38 7 dissemination. But the same issue for that, they have not
10:47:43 8 produced those same design drawings if they have them for
10:47:47 9 the Gen 1. So we'd ask that you would make that order
10:47:50 10 applicable to both Gen 1 and Gen 2.

10:47:53 11 MS. MOORE: Your Honor, we have. We've produced
10:47:57 12 the CAD drawings, rack assemblies, tack pump modules
10:48:02 13 drawing files, a case study, let's see --

10:48:06 14 THE COURT: I'm good. I'm not going to amend my
10:48:10 15 order on Gen 1. That's for Gen 2.

10:48:14 16 And then, I have a third issue. Documents that
10:48:26 17 GRC has concerning Midas' systems. Do you know whether or
10:48:33 18 not GRC has any of these documents?

10:48:36 19 MS. MOORE: I'm not aware of them having any of
10:48:39 20 these documents. To the extent they do exist, which,
10:48:42 21 again, I don't believe they do, the typical kinds of
10:48:44 22 comparisons you would see are kind of the cost of the
10:48:47 23 system and kind of the footprint and how much electricity
10:48:51 24 it can save or provide in terms of power output. It's
10:48:56 25 nothing that is a actual comparison of the features of the

10:48:59 1 tank from, for example, my client to anyone else in the
10:49:03 2 industry. I'm not aware of anything like that.

10:49:06 3 THE COURT: I'll hear from the plaintiff what you
10:49:10 4 want with respect to these documents.

10:49:13 5 MR. THOMAS: Yeah. You know, the documents that
10:49:20 6 would -- these documents would be very relevant to whether
10:49:26 7 or not it's a non-infringing market-acceptable substitute.
10:49:28 8 So the comparisons between our product and theirs or
10:49:34 9 analysis of our product and theirs would be very relevant
10:49:36 10 to that.

10:49:39 11 THE COURT: A response to that.

10:49:40 12 MS. MOORE: Your Honor, we disagree. The size of
10:49:44 13 one person's tank versus another has nothing to do with
10:49:47 14 the patents-in-suit. Similarly the power output has
10:49:51 15 nothing to do with the patents-in-suit. And therefore,
10:49:55 16 again, to the extent any comparisons exist, which I'm not
10:49:58 17 aware of any, those kinds of comparisons have absolutely
10:50:02 18 nothing to do with the patented technology. And the RFP
10:50:06 19 as it is written asks for everything that goes back to
10:50:10 20 2009. So 13, 14 years worth of documents that are
10:50:15 21 completely untethered to the technologies of the
10:50:20 22 patents-in-suit, it's extremely onerous for us to go
10:50:23 23 through this vast amount of information as a third party
10:50:25 24 and there's no --

10:50:25 25 THE COURT: I'm good. I'm going to deny the

10:50:29 1 relief.

10:50:30 2 Issue No. 4, Midas moves to compel GRC to produce
10:50:35 3 communications between GRC and Rhodium. Let me ask the
10:50:49 4 plaintiff, why are you asking for these -- from GRC and
10:50:53 5 not from the defendant, who is in the case?

10:51:00 6 MR. THOMAS: Your Honor, we have asked for the
10:51:03 7 same information. We're not sure we got it all. We
10:51:06 8 thought that it may be -- it's important stuff and I
10:51:10 9 think --

10:51:10 10 THE COURT: Again, you think you may not have
10:51:13 11 gotten it all. Have you asked -- have you asked Rhodium
10:51:19 12 if you have all of it?

10:51:21 13 MR. THOMAS: Well, yes, we have. They said
10:51:23 14 they've produced everything they have. Now, it's possible
10:51:26 15 that GRC has things in their possession that Rhodium
10:51:29 16 doesn't have.

10:51:32 17 THE COURT: I'm going to deny that request, as
10:51:35 18 well.

10:51:35 19 That's all that I have here, I think. Is there
10:51:38 20 anything else that I missed that you all asked me to work
10:51:41 21 on?

10:51:43 22 MR. THOMAS: No, your Honor.

10:51:44 23 THE COURT: Anything else for GRC?

10:51:47 24 MS. MOORE: No, your Honor.

10:51:49 25 THE COURT: Okay. Have a good weekend. Thank

10:51:51 1 you.

10:51:51 2 MS. MOORE: Thank you.

10:51:54 3 MR. SMITH: Thank you, your Honor.

4 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
Registered Merit Reporter, in my capacity as Official
Court Reporter of the United States District Court,
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I certify that the transcript fees and format comply
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Lily Iva Reznik

~~~~~  
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